FILED
SEP 12 1980
MICHAEL RODAK, JR., CLERK

No. 79-2059

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION, and
INDIANA & MICHIGAN ELECTRIC COMPANY, Corporations,
Petitioners,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA, Municipal Corporations,
Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF

Of Counsel:

JAMES J. OLSON
JOHN M. RIGBY
THEODORE M. BENDALL
JAMES R. FLECK
EDWARD A. CHAPLEAU

THOMAS R. EWALD
1000 Potomac St., N.W.
Washington, D.C. 20007
(202) 333-5533

GERALD M. STERN
DAVID R. BOYD
1730 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 466-6464

Counsel for Respondents

September 12, 1980

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases: Page

City of Groton, et al. v. *Connecticut Light & Power Co.*, Civil No. 15,609 ..... 1, 2, 3

City of Mishawaka, Indiana, et al. v. *American Electric Power Company, Inc., et al.*, 616 F.2d 976 (7th Cir. 1980) [*Mishawaka II*] 2

City of Newark v. *Delmarva Power & Light Co.*, 467 F.Supp. 763 (D. Del. 1979) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-2059

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION, and
INDIANA & MICHIGAN ELECTRIC COMPANY, Corporations,
Petitioners,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA, Municipal Corporations,
Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF

On September 8, 1980, Petitioners filed a Supplemental Brief to call attention to the August 27, 1980 decision of the United States District Court for the District of Connecticut in *City of Groton* v. *Connecticut Light & Power Co.*, Civil No. 15,609. Petitioners erroneously suggest that this recent decision is in conflict with the Sev-

enth Circuit's decision in the instant case—*Mishawaka II*.[1] This suggested conflict is surprising, since the District Court in *City of Groton* relied on the principles of *Mishawaka II*, *see* 20 SA,[2] and found no conflict between its decision and that of the Seventh Circuit. *City of Groton* thus confirms Respondents' initial claim that "the unique facts" on which *Mishawaka II* rests "will prove difficult to duplicate in other antitrust cases . . . ." Respondent's Brief at 6.

1. Petitioners claim that the *City of Groton* decision is "diametrically opposed to the analysis and the result in *Mishawaka II*." Petitioners' Supplemental Brief at 3, citing 19 SA. But Petitioners fail to mention that the District Court in *City of Groton* specifically found that the "particular aspects of the rates" at issue in that case "were not so devoid of reasonableness as to justify the inference that they were intended to enhance [the utility's] alleged monopoly power." SA 20, citing *Mishawaka II*, 616 F.2d at 885. The mere fact that the "particular aspects of the rates" in *City of Groton* differed from those at issue here does not establish a conflict worthy of review by this Court. To the contrary, *City of Groton* demonstrates that the lower federal courts are quite capable of determining when *specific facts* justify the inference that *specific rates* are so devoid of reasonableness as to justify the inference of intent to serve monopolistic purposes.[3]

---

[1] Of course, a conflict between a decision of a district court and a decision of a court of appeals is normally accorded little, if any, weight by this Court in determining whether to grant a writ of certiorari.

[2] Petitioner's Supplemental Appendix reproducing the *City of Groton* decision is cited herein as "SA".

[3] Petitioners claim that *City of Groton* "recognizes" a split of authority between *Mishawaka II* and *City of Newark* v. *Delmarva Power & Light Co.*, 467 F.Supp. 763 (D.Del. 1979), "over whether [the antitrust court] should even consider the merits of the price

2. For similar reasons *City of Groton* does not warrant a grant of certiorari to review the award of attorneys fees in this case. *See* Petitioners' Supplemental Brief at 4. The Court in *City of Groton* declined to exercise its *equitable powers* to award to the *defendants* attorneys fees incurred in connection with the *defense of the litigation.* 33-35 SA. In the instant case the Court of Appeals awarded *plaintiffs* the fees they incurred in litigating before the Federal Power Commission precisely because those fees were an element of the antitrust damages suffered by the plaintiffs. *City of Groton* is thus totally inapposite with respect to the attorneys fee question at issue here.

CONCLUSION

For the reasons stated above, certiorari should be denied.

Respectfully submitted,

Of Counsel:

JAMES J. OLSON
JOHN M. RIGBY
THEODORE M. BENDALL
JAMES R. FLECK
EDWARD A. CHAPLEAU

THOMAS R. EWALD
1000 Potomac St., N.W.
Washington, D.C. 20007
(202) 333-5533

GERALD M. STERN
DAVID R. BOYD
1730 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 466-6464

Counsel for Respondents

September 12, 1980

---

squeeze claim where both the wholesale and resale prices are completely regulated by government agencies." Petitioners' Supplemental Brief at 3, *quoting* 30 SA n.19. But *City of Groton* simply noted that there "appeared" to be a split of authority and declined to resolve the issue. 30 SA n.19. This alleged "split of authority" between decisions of a Court of Appeals and a District Court, which was not noted in Petitioners' initial Brief, is certainly not grounds for grant of a writ of certiorari.